



MAKERERE UNIVERSITY



MAKERERE INSTITUTE OF SOCIAL RESEARCH

POLICY BRIEF NO. 3, OCTOBER 2015

Politics of indigeneity:

Land restitution in Burundi

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Activities of the land commission were brought to a halt this year in March 2015, with barricaded roads using stones and tree trunks set by communities living in the southern province of Makamba, bordering Tanzania, in Burundi preventing the land commission's agents from implementing their decisions. For over two weeks, both residents '*abasangwa*' and repatriates '*abahungutse*', stood together to oppose the land commission: the Commission Nationale Terres et autres Biens (CNTB, National Commission of land and other Assets), a body revisiting land restitution cases it had previously settled. The land commission had previously favoured the sharing of property between returnees and the residents. *Abasangwa* and *abahungutse* in Makamba together also accused the commission of corruption, with individuals owning several properties as a result of bribing the land commission's officials. The commission launched in 2006, was prevented from operating in the southern province, which has experienced high movement of the population crossing over to Tanzania back and forth due to recurring violence. Residents of Nyanza-lac, Kibago, Vugizo and Mabanda communes in the Makamba province, viewed the recent move by the land commission as a form of 'spoliation', in their eyes the commission had enabled corrupt practices with people acquiring several plots of land through bribing CNTB officials, overturning resolved land restitution cases. In March 2015, the president's office supported the governor's decision to suspend temporarily activities of the CNTB till after the 2015 elections.

Tensions are high following the 2011 approach of the CNTB, to restore property currently owned by *abasangwa*, to *abahungutse*, thus ending previous land sharing agreements as a solution to land scarcity and reconciling communities. Those with title deeds, argue that they bought the land in good faith, and have thus contested the legality of these claims. There have also been cases when the land commission attributed property to *abahungutse*, while the local tribunal rules on behalf of *abasangwa*. The validity of a title deed, or whether a property owner could have bought the home in good faith, has of recent been questioned and rejected by the land commission, a body under the auspices of the office of the presidency. The commission, which offers no compensation to *abasangwa*, have asked them to seek compensation from the person they bought the property from. Thus the state seeks to limit its own cost and hence refuses to compensate either party.

This policy brief provides an overview of the new 2006 land restitution policy, and its major consequences on the post-conflict country of Burundi. Land has become central to addressing the past and political violence experienced by Burundi, in particular in 1972. In 1972, a massacre of Hutu elites and peasantry by the republican state, led by a Tutsi military dictatorship took place. After the violence, which killed over 150,000, exiled thousands of Hutu, the state distributed the land to new landowners (mostly Tutsi), and private companies. Land remains a material reminder in the present about the contested memories and experiences of the past. Land disputes furthermore play into the politics of autochthony about who belongs and does not belong, who is a citizen and who can be heard by the state. Land restitution offers not only a way of acknowledging the past, of healing, but also of rendering some form of justice to one part of the population, and reaffirming their citizenship.

Land administration is instrumentalized by the state to address the land question facing thousands of returning refugees. Consecutive political violence since Burundi's independence has produced a displaced population: refugees, orphans, and internally displaced persons amongst others. The land restitution process has been used as a way to assert indigeneity and serve as a form of compensation for past injustices. This process has

recreated new victims and perpetrators. There is a mirroring effect, with *abahungutse* looking at themselves as victims, and looking at residents as 'perpetrators' or accomplice of the state that wrongfully took hold of their property. At the same time, *abasangwa* view themselves as the new victims of a 'vindictive' post-war government led by the National Council for Defence and Democracy – Forces for Defence and Democracy, the CNDD-FDD in power since 2005, which fails to recognize that amongst them, there are those who brought property in good faith, or had previous governments allocating land to them and urging them to move into vacant plots.

In this policy brief, land restitution as performed by the land commission has revealed two policies: the policy on paper, and what happens on the ground as also constituting policy, and varying from the former. There is a discord between the approach of the commission on paper, which was reconciliatory, and the approach of the commission in practice, which over-time has proven to be divisive. The latter approach has continuously been challenged as the incident in Makamba province shows. Land restitution in Burundi shows how a new policy may emerge as the outcome of the land commission's actions, and inactions.

A reconciliatory policy

The *Commission Nationale de Réhabilitation des Sinistrés* (CNRS) created in 2002, was in 2006 replaced by the *Commission Nationale Terres et autres Biens* (CNTB). Restoring the property of the thousands of returning refugees was a high priority for the CNDD-FDD government. The commission classifies refugees in two categories: longstanding refugees from 1972. The second category is recent refugees who fled the country in 1993; this includes both members of Hutu and Tutsi population. The 1993 refugees were able to more or less regain easily their property. The main problem was the long-standing refugees of over 30 years who returned and wished to access their former properties. People without reference to their former property were placed in 'integrated rural villages', which include refugees of 1972. The number of 1972 and 1993 refugees repatriated from 2002 to 2009: 524,222 with the majority being 1993 refugees while 162,156 Burundi refugees received citizenship from Tanzania in 2014.

In the CNTB annual report 2006-2011, the land commission sets out to resolve conflicts connected to the “1972 crisis” through the “amicable settlement, restitution of property, sharing of property, demarcation, transfer, retrocession, confirmation of ownership by occupier, compensation.” The types of land disputes include: conflicts connected to land used by the state, land use and sell by a third party. In all its activities the CNTB aims to be neutral and to “reconcile law, equity, peaceful cohabitation and peace consolidation.” The role of the commission was to explain and make the repatriate and the resident, understand that neither of them were at the root cause of the conflict and that they will gain from such cohabitation.”

The repatriate, upon his return from exile – from the war – and finds his plot occupied by another person or the state has built some form of infrastructure is to seek the CNTB. The report emphasizes that those who seek the CNTB is limited to those who fled because of the “socio-political crises”. The CNTB then asks the person to bring documents or witnesses and record the “plaintiff”, the “accused” living in the plot is invited to bring documents/ explain themselves, bring a witness to support him, next part is when the land commission tried to make them reach a compromise. The aim is for every repatriate to have a home and live peacefully. The land commission has a provincial delegation in each province, whose aim includes: doing an inventory of land owned by the state, and identify land illegally acquired, handle all cases submitted by the *sinistrés* (victims), as referred to in the CNTB annual report, with the aim of helping them recover their property, provide technical assistance to *sinistrés* to acquire their property rights. They consider the possibility of compensating the *sinistrés* who have not recovered their land or goods and resolve pending litigations from the previous commissions.

The history of this organization is that from 2006 to 2011 in its first mandate led by the clergyman Astère Kana, it primarily sought to do inventory of land owned by the state, vacant land and privileged the sharing of properties or mediated settlement agreed by both parties. The commission after 2011 sought for those living in the property owned previously by the Hutu who fled 1972, to promptly vacate the property. In their records, Up to 2013, out of 37062 cases recorded since 2006, 59,9% were resolved ami-

cably, 26,12% resolved through CNTB decision – which means, the current occupant told to vacate the property, 13,98% not conflict related cases, cases which are unresolved 29,88%. By ending mediation in resolving land disputes, the commission gave place to arbitrary ruling.

A compensation fund was rejected because the CNTB does not believe that there are those who bought property in good faith. A special court was approved in April 2014 by parliament, which would give the final verdict in regards to land claims dealt by the land commission. There were discrepancies between verdicts between the local tribunals and land commission. There have been many instances where land commission would attribute property to *abahungutse*, while the local tribunal rules on behalf of *abasangwa* recognizing their property title over the testimonies of *abahungutse*. This special court will only hear all land disputes, and the court will give its final verdict, without the possibility of appealing to other courts as currently done. This is to reduce the costs of going to court for the returnee in CNTB's view and to speed up the whole process of recovering land for returnees. For the civil society and opposition, this is against the constitution, as it dissolves the possibility of a case being taken to the Supreme Court. Secondly the CNTB can review cases where judgment was previously passed by ordinary courts. The new law gives powers to the CNTB to recover land it views as illegally acquired, this is dangerous, as it makes possible for the CNTB to dispossess people of their land. Thus the CNTB will have more powers and be less independent.

The land restitution policy in practice

The CNTB came under the presidency's office following revision of the CNTB law in 2011, and welcomed newcomer members of the ruling party, and the Forces Nationales de Libération (FNL) members who actively took part in the armed rebellion – which ended in 2006 – were appointed as provincial delegates of the CNTB. The new head, Serapion Bambonanire, accused the work of CNTB of favouring the residents and also called for unconditional restitution of land for the 1972 refugees from residents were now referred to as secondary occupants.

Before the CNTB the mode of resolving land disputes, was the involvement of local leaders such as *Bashingantahe*. In the past, *Bashingantahe* as wise men and women of the community, and other local leaders, use to resolve land conflicts by advising the two parties to share property, have become excluded from this process. The land commission has become an institutional decision-making body, which does not listen to both side and is aggravating land disputes. Political parties and civil society argue that the CNTB has not aimed at reconciliation, but is instead reviving ethnic hatred accusing the ruling party of seeking votes in the 2015 elections.

In an interview with a CNTB official in November 2013, working on cases in Bujumbura city, he estimated that 85% of land disputes cases are Hutu vs. Hutu over plot disputes, thus for him they are ethnicity only plays an aspect in the restitution of houses not land. Yet when it comes to housing it is disputed between Tutsi vs. Hutu in disputes. The disputes over property, which the official was handling in Bujumbura, were about Tutsi residing in houses owned previously by Hutu. Property is returned to 1972 owners, and then the current owner is not compensated but told to pursue the person they brought the house from, the official added.

The CNTB is viewed as a politicized entity, in place to settle political and ethnic scores: this is the view of Abbot Adrien Ntabona, the former head of the *Bashingantahe* council. For Ntabona, the current ruling party wishes to gain a Hutu electorate through this. Describing it as an ‘explosive situation,’ he said that no *mushingantahe* can get involved because there is a lot of scheming within the land commission. The interviewed CNTB official said those who oppose its work have politicized it, and yet those who oppose CNTB argue that it is the CNTB, which has politicized land restitution. For the CNTB official, land disputes are instrumentalized and are “an opportunity to express the frustrations against the CNDD [-FDD].”

Prudence Bigirimana in southern Burundi in Bururi province, a native of another commune, Matana, in the same province, has been living in Rumonge, a town on the western coast for over two decades. Bigirimana lost his plot of land to a repatriate last year in 2014 in the Rumonge commune. The returnee Nyabenda Buyabara returned from Tanzania in 2009 and

sought to resolve the problem amicably. Failing to reach an understanding, Buyabara then went to the land commission to claim his property. Bigirimana on the other hand, argued that it is the OHP (Palm oil office), a state company, which gave out the land to encourage farmers to plant oil palms in 1983. Bigirimana has documents to show proof. In 2013, the land commission listened to both parties and visited the property. The commission thereafter gave right of property to Bigirimana, and then asked the plaintiff to make an appeal at the national level within two months deadline. This was not done. Nevertheless, in May 2014, Bigirimana attested that the commission brought the repatriate in the property by force and refused to listen to Bigirimana. Bigirimana questioned how the commission could give out land to someone who lost before the commission and did not even appeal. Similar cases are common in Makamba province and the population warned that it would lead to conflict. Two different decisions were made in one case. The commission defended itself saying that Buyabara complained to the commission after Bigirimana sold the property to someone else, and the commission asked the plaintiff to appeal in Bujumbura.

In an interview with Bigirimana, he called the commission “fraudulent”, describing it as corrupt with the commission in his view urging repatriates to seek a number of people to play the role of witnesses to claim land, which is not theirs, by paying CNTB some money. There is a lot of hostility in the community, said Bigirimana, adding, “now we are hoping for a change in government, we hope a new body will come to undo the injustice done.” For Bigirimana, it is less about ethnicity now, ethnicity only appears when it comes to revisiting cases already settled by the sharing of property between returnees and residents, and when houses built post-1972 are attributed to repatriates because those homes were built in their properties. Pierre Bandyatuyaga, who lost two of his properties in 1972 in Rumonge, gained them both in April 2014. Bandyatuyaga was elated and said justice was served, “better late than never”. He won the case after appeal in the special court. Emmanuella Tuyishemeza a representative of one of the properties said that the commission granted Bandyatuyaga the home without considering that it is her father who built the house in the property and not Bandyatuyaga. Tuyishemeza added that previously, the appeal court had

rejected the CNTB provincial delegation's decision to attribute the property to Bandyatuyaga, but that it had to be divided into two.

The land commission is used by the state to depoliticize the land disputes, by bureaucratizing the process of land, making it a procedural matter. Yet increasingly, the land commission's work is seen as reigniting not only ethnic tension but as privileging one part of the population over the other. However now, the land commission cases are not limited to Hutu vs. Tutsi, but involve cases of Hutu vs. Hutu. The land commission on the other hand argues that reconciliation can only happen when those who have returned have their property restored. The head of CNTB, Bambonanire was reported as saying that *abahungutse* and *abasangwa* should not share their properties with the residents unless they are siblings. This suggested that for instances many properties in the Imbo plain coast region of Burundi, had been 'occupied' by Tutsi people who must return, to their place of origin in the mountains.

Findings and recommendations

Two policies have emerged from the land commission: the policy on paper vs. the policy as implemented. The former privileged the amicable settlement between claimants and residents, while the latter, following new leadership, privileged the claimant obtaining their full property after 2011. The implementation of the policies of the land commission has created more enmity within communities in general. What the Makamba incident shows is how a community, which has reconciled through the mediation initially exercised by the land commission, can defend themselves and their interest against perceived abuses by the land commission.

The following points summarize the main points and include suggestions of how to reconcile the policy on paper with the policy in practice:

- Policymaking should be an inclusive process; everyone in society is a stakeholder. With the state playing a facilitating role, in resolving land disputes and past injustices, this would reconcile communities, and allow dialogue between the claimant, and resident, through the mediation of community leaders such as *Bashingantahe*, local administrators, and clerics. Thus challenging the old and new categories of victims, perpetrators and bystanders.
- The land commission is, by allocating land to former refugees, affirming their citizenship, land is used as a symbolic and material representation of belonging, indigeneity and citizenship. Restoring properties to those who owned them before 1972 without acknowledging that those who reside in them may not necessarily be its first occupants after 1972, or even that first occupants may not have alternative accommodation, has challenges to the process of reconciliation after the civil war. Previous governments remain blame-free and it is the masses, citizens who have to pay for the conditions created by past government. The burden remains on the claimants to bring evidence that they were previous owners of the properties: A land title is not required but witnesses rather.

- The law in the past privileged those who remained behind. From a *longue durée* perspective, the state continues to privilege one part of society over another. CNTB has been described as pro-returnee and pro-ruling party, and as part of the CNDD-FDD's drive to control all public institutions. The establishment of the land commission without a Truth and Reconciliation Commission to work hand-in-hand together to acknowledge events of the past, and provide funding for compensation, has created and continues to create new victims and perpetrators, and performed inclusionary and exclusionary practices that have strained the nation and peace building process of Burundi post-violence. The political settlement, based on consociational power-sharing agreement, has been a top-down initiative and has not engaged in dialogue with the population, rather dividing the population as either perpetrator or victim. Not compensating the residents and holding them accountable for past violence by the state against the population. Land restitution in this instance comes to inform and strengthen one view of the past where one part of the population is a victim of another part of the population.
- Can the state's approach plausibly be considered as restorative justice and as transcending the categories of conflict? Does this serve as foundation for a new society: a new community, new political relation, and new man/woman in post conflict Burundi? Unfortunately the responses to these interrelated questions are negative. Despite invoking land as restorative justice, the Burundi experiment has been seen as having many challenges. The approach is elitist and too institutional and fails to involve communities in addressing land alienation and other legacies of the violence. It is less democratic and is executed in a top-down approach. At the top, the two, commission and the special court are passing conflictual orders and decisions, which have been challenged, by other court. Above all the approach is more of bureaucratizing and has a depoliticizing effect. It appears more of a corrective rather than restorative justice.

In brief, the Burundi experience reveals the scar and trauma of the violence in the political foundation and essence of the post conflict community of Burundi. It misses the concept of survivor's justice and victor's justice, as argued by Mahmood Mamdani, in *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2001). Mamdani argues that the solution is the deethnicization and depoliticization of ethnic identities, through survivor's justice, in which Hutu, Tutsi, and Twa are both survivors and all belong to the land. If the land question is used to address past injustice, political violence has continuously produced new sets of displaced victims in Burundi, then justice is for which sets of victims? Survivor's justice can be applied to resolving the land disputes, by treating all citizens, as survivors of past events and creating a fund to support all former refugees in starting a new life, restoring their property to them, and at the same time compensating those who bought the property in good faith. Designating state-owned or church-owned land to use as communal fields where people can use for farming, and housing will help resolve land scarcity.

List of Policy Brief

1. Professor Mahmood Mamdani, *Beyond Nuremberg: Learning from the Post-Apartheid Transition in South Africa*, October 2015
2. Akoko Akech - PhD. Fellow, *Kenya's Constitution and Institutional Reforms after Political Violence 1991-2010*, October 2015
3. Haydee Bangerezako - PhD. Fellow, *Politics of indigeneity: Land restitution in Burundi*, October 2015
4. Laury Lawrence Ocen - PhD. Fellow, *Justice and Peace after war: Conceptual Difficulties in the discourses of Transition and Reform*, October 2015
5. Esibo S. Omaada - PhD. Fellow, *What is Kenya Becoming: Dealing with Mass Violence in the Rift Valley of Kenya*, October 2015
6. Professor Mahmood Mamdani, *The Land Question and Customary Tenure: Some Preliminary Policy Recommendations*, October 2015
7. Dr. Giuliano Martiniello - Research Fellow, *Policy Paper – Large Scale Land Acquisitions*, October 2015
8. Dr. Pamela Khanakwa - Research Associate, *National Policies and Inter-District Territorial Boundary Conflicts: Lessons from the Bugisu-Bugwere Dispute over Namatala Wetland*, October 2015



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